No. 22297

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RALPH WILMOT, Counsel for the General Counsel of the National Labor Relations Board,

Appellant,

v.

DAVID DOYLE, National Labor Relations Board trial examiner on relation of LOCAL 959 OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INDEPENDENT, and GROCERS WHOLESALE, INC.,

Appellees.

ON APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

REPLY BRIEF FOR THE GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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I. THE ISSUE OF MOOTNESS

Appellees argue (Br., p. 5) that the denial of appellant's ion to vacate the judgment of the District Court as moot "disposes" the contention that the subpena enforcement proceedings in the District rt were mooted by the Board's subsequent revocation of the subpena. believe such a claim is incorrect. The language of the Court's order s not indicate that the Court decided the substantive question of tness; rather, it appears that the Court simply denied the motion at t time without prejudice to our right to raise it in the argument on merits. Even assuming that the Court did rule on the question of

ness, it would not, of course, be precluded from reconsidering appel-
's contentions now. Cf. Ferretti v. Dulles, 246 F. 2d 544, 545, 547
. 2).

Appellees next contend that subsequent revocation of an admin-
ative subpena does not render district court enforcement proceedings
in any event because the entry of an order enforcing the subpena
s the continued existence of the subpena itself "irrelevant" (Br.,
, n. 2). This assertion is incorrect. As the Court of Appeals for
Tenth Circuit has recognized:

> The only power conferred upon the District Court is to issue an order directing obedience to a subpoena by the Board in a proceeding under consideration before it. Certainly such a proceeding is not complete in itself. It comes into being only as an aid to a proceeding pending before the Board. Aside from that, it has no purpose.

hy Packing Co. v. N.L.R.B., 117 F. 2d 692, 694. Thus, the function
he district court is a limited one. It must grant the application
enforcement ". . . if the inquiry is within the authority of the
cy, the demand is not too indefinite and the information sought is
onably relevant." U.S. v. Morton Salt, 338 U.S. 632, 652-653. See
Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 214-218.[1/]

1/ Cf. F.C.C. v. Schreiber, 381 U.S. 279. There, the Federal Communications Commission issued a subpena duces tecum directing the president of a corporation to appear at a public hearing and produce certain documents. Upon his refusal to produce certain materials unless the Commission could assure him that the information contained therein would be held in confidence, the Commission filed a petition for enforcement of the subpena in a district court. The court enforced the subpena but directed that the testimony given and the documents produced be received in camera. This Court affirmed, holding that the district court had not abused its discretion in so conditioning the order. The Supreme Court, however, reversed and directed that the subpena be enforced without modification. The Court pointed out the district court's "limited judicial responsibility" in subpena enforcement proceedings and held that "the question for decision was whether the exercise of discretion by the commission /in ordering that non-public hearings be held only in specifically limited circumstances/ was within permissible limits, not whether the District Court's substituted judgment was reasonable" (381 U.S. at 291).

ing in the statutory or case law suggests that the district courts issue orders directing individuals to appear, produce evidence, or testimony before an administrative agency in the absence of an outding subpena, validly issued by that agency. Section 11(2) itself ers jurisdiction on the district courts only "in case of contumacy efusal to obey" a subpena issued pursuant to Section 11(1). In t, if there is no longer any subpena, the district court order "has urpose" (Cudahy Packing Co. v. N.L.R.B., supra) and is, accordingly,

To the extent that Flotill Products, Inc. v. F.T.C., 278 F. 50 (C.A. 9), cert. denied, 364 U.S. 920, may be interpreted as suging that a district court order enforcing an agency subpena is letely independent of the administrative proceeding giving rise to court action and retains its effectiveness even after the revocation he subpena, we respectfully submit that it is inconsistent with the eme Court's decisions in Oklahoma Press Publishing Co., supra; and C. v. Schreiber, supra. In any event, Flotill is distinguishable ts facts. There, the district court issued an order enforcing a ena issued pursuant to Section 9 of the Federal Trade Commission (15 U.S.C. 49), but narrowing the scope of one of its provisions. ppeal, this Court rejected the contention that the district court no power to issue an order "different in character" from the administrasubpena, holding that after the issuance of the court order, the der subpena issued by the hearing examiner was "superseded" and me "inoperative and irrelevant" (278 F. 2d at 852). This reasoning not, of course, provide any basis for the argument that revocation subpena by the body that originally issued it, and whose proings it is part of, is "irrelevant."

Nor would the points raised in appellees' answer to appellant's
on to vacate judgments[2] preclude a finding that the District Court
eedings are moot. They contend that the Board's revocation of the
ena was invalid because the General Counsel's request for special
ission to appeal from the Trial Examiner's ruling was not "filed
otly" and served on the other parties "immediately," as required by
ion 102.26 of the Board's Rules (29 C.F.R. 102.26). The record,
ver, shows that Wilmot announced his intention to seek special per-
ion to appeal from the Trial Examiner's ruling on Wednesday, October 4,
immediately after the motion to revoke the subpena was denied (R.
At the District Court hearing on the following day, he stated
the appeal had been undertaken (TR. 3). It is not disputed that
egraphic request for permission to appeal was in fact sent to the
later the same day. We submit that, in these circumstances, their
tion that the request was not filed "promptly" is frivolous. The
ntion that the request was invalid in any event because it was not
d upon appellees "immediately" is also without merit. As shown,
equest was made on the afternoon of October 5, 1967, a Thursday.
Union and the Company admit that they received copies of the telegram
gh the mail on October 9 and 10 respectively, the following Monday
uesday (answer to appellant's motion, p. 7).[3]

Moreover, appellees never objected to the Board that Wilmot's
st was untimely or that service upon them was inadequate. Although
lees now contend that this short interval resulted in sufficient

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ncorporated by reference into their brief (Br., p. 5 n. 2).

[3] The copies of the request for leave to appeal were mailed from the Board's Regional Office in Seattle, and were addressed to the Union's counsel in Seattle and the Company's counsel in Anchorage.

irness to invalidate the Board's subsequent action, they offer no
ence indicating that they were prejudiced in any way. In light of
fact that the Board did not act upon the request until October 27,
well over two weeks after the Union and the Company were served,
difficult to see how a claim of unfairness resulting from delay
ervice could be supported.

Similarly, there is no support for the argument that the Board
unfairly in granting Wilmot leave to appeal and, at the same time,
g on the merits of the appeal. The subpena (R. 7), the General
el's petition to revoke (R 8-9), an affidavit in support of the
ion (R. 10), and the Union's affidavit in opposition setting forth
ontentions in the matter (R. 11-15), were all included in the record
e the Board when it ruled on the appeal. Appellees do not suggest
further contentions would have been made or what additional evidence
have been presented if they had taken advantage of their opportunity
bmit an opposition to the appeal. In such circumstances, they can-
ow argue that they were prejudiced by the Board's action in making
ermination on the basis of the record before it.

II. NOTHING IN THE NATIONAL LABOR RELATIONS ACT OR THE ADMINISTRATIVE PROCEDURE ACT AUTHORIZES THE SUIT WHICH APPELLEES BROUGHT

The contention (Br., p. 9-23) that Section 11(2) of the Act
des a basis for appellees' action is completely frivolous. Appel-
oncede (Br., p. 10) that the language of that section, if "literally
ed," confers no jurisdiction on the district courts to enforce
subpenas upon the application of private litigants. They also
nize (Br., p. 7) that the courts have consistently refused to enter-
such suits. They contend, however, that the statutory language
d be "interpreted broadly" (Br., p. 17) to permit what it plainly
udes.

In support of this argument, appellees point to Section 1(b) e Act, in which Congress declared it to be the policy of the Act eate "orderly and peaceful procedures" for the prevention of unfair practices (29 U.S.C. 141). They contend that permitting private for subpena enforcement is consistent with congressional intent se it would "facilitate 'orderely' hearings by expediting the taking stimony" (Br., p. 13). We submit that, on the contrary, such an retation would facilitate the use of dilatory tactics to interfere he Board's processes. Proceedings before the Board's trial examiners be prolonged unnecessarily by the initiation of district court for the enforcement of burdensome, frivolous, or plainly irrelevant as.[4/] The circumstances of this case illustrate the potential for essary delay inherent in appellees' interpretation.

Appellees also rely (Br., p. 15) on Section 6(d) of the Administrative Procedure Act (5 U.S.C. 555(d)),[5/] which they contend must be n "pari materia" with Section 11(2). They argue that Congress'

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ection 11(1) of the Act (29 U.S.C. 161(1)) provides that

> The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application (emphasis added).

us, there are no limits placed upon the number of subpenas obtainable the type of evidence which might be demanded. Moreover, while the rty to whom the subpena is directed can file a petition to revoke der Section 11(1), there is nothing to prevent the party requesting e subpena from filing a suit in the district court before the Board kes its final ruling on the petition, as did the appellees here. . N.L.R.B. v. McLean, 47 LRRM 2498, 2499 (S.D.N.Y.).
t out in full on p. 15 of appellees' brief.

ure in Section 6(d) to specify which parties may institute subpena rcement proceedings "is a clear indication that Congress wanted no limitation or differentiation imposed" (Br., p. 16-17). We submit the more logical assumption is that Congress' silence on the point cates its desire to remain free to fashion subpena enforcement pro- res appropriate to the particular agency involved. Thus, Section), which was re-enacted without change at the time of the 1947 Taft- ley amendments (61 Stat. 136), one year after the tion of the Administrative Procedure Act, specifically limits district t jurisdiction to actions instituted by the Board. The statutes cited ppellees' brief (p. 14-15), on the other hand, are equally specific llowing any party to initiate such proceedings. As appellees admit, ress has indicated repeatedly that it is bound by "no uniform tice" (Br., p. 14) in drafting such provisions.[6/] Thus, the legisla- cited by appellees merely provides further support for the already ous conclusion that if Congress had contemplated actions such as this nacting Section 11(2), it would not have specifically limited the rict courts' jurisdiction to cases commenced "upon application by Board."

Section 3 of the Administrative Procedure Act (5 U.S.C. 552), appellants contend demonstrates a congressional policy favoring

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6/ For examples of provisions similar to the one involved here, see 15 U.S.C. 49, which specifies that in cases of disobedience to a subpena issued by the Federal Trade Commission, "the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence," and 15 U.S.C. 77v(b) which gives the district courts power to enforce subpenas issued by the Securities and Exchange Commission only "upon application by the Commission" (emphasis added).

road" interpretation of Section 11(2), is totally irrelevant. That
ion, as amended by the Public Information Act of 1966, requires only
an agency make available, upon proper request, copies of its opinions,
rs, and, with certain exceptions, other "identifiable records." In
event the agency refuses to comply, a suit to compel production of
improperly withheld records may be commenced in a district court
r subsection (a)(3). Nothing in the statute indicates that it was
nded to expand the jurisdiction of the district courts in subpena
rcement proceedings. Having failed to pursue the required steps
r that section, appellees are in no position to rely on an asserted
ong congressional policy in favor of disclosure of information in
possession of the government" (Br., p. 18) as a basis for otherwise
xistent district court power in an entirely unrelated proceeding.

Finally, appellees urge the Court to adopt their interpretation
ection 11(2) as a means of avoiding a constitutional issue -- i.e.,
ner denying private litigants the right to initiate subpena enforce-
proceedings, while granting that privilege to the Board, amounts
denial of "equal protection of the law" to the extent that this guarantee
neld to be incorporated into the "due process" clause of the Fifth
dment in Bolling v. Sharpe, 347 U.S. 497. It is clear, however,
their constitutional challenge has no basis. As the Supreme Court
rved long ago, the equal protection clause does not secure to all
gants "the benefit of the same laws and the same remedies." Brown
ew Jersey, 175 U.S. 172, 175. A denial of equal protection is
olished only upon a showing that someone ". . . comparably situated
been treated differently. . ." National Union of Marine Cooks and
ards v. Arnold, 348 U.S. 37, 41. It does not require extended argu-
to show that the Board, as a federal administrative agency charged

enforcement of the National Labor Relations Act, and appellees, as ate litigants before the Board, are not "comparably situated." Thus, distinction drawn by Congress in Section 11(2) is not "wholly irrele- to achievement of /its/ objectives" (Kotch v. Board of River Port Commissioners, 330 U.S. 552, 556) and, accordingly, appellees may claim a denial of equal protection.[7/]

III. 28 U.S.C. 1337 IS INAPPLICABLE TO THIS CASE

Appellees concede (Br., p. 24-25) that the review procedures ded by Section 10(e) and (f) of the Act are exclusive, precluding district courts' assertion of their general equity powers under 28 . 1337, if they are "adequate to protect statutory and constitutional s" (Br., p. 24). As shown in our main brief (p. 12-14), the pro- ns of the Act are clearly adequate: the Board's order cannot become tive before appellees' contentions with regard to the subpena, which have been preserved by a simple offer of proof, are reviewed by propriate court of appeals. The argument that the time and expense red to pursue the statutory avenue of review renders it inadequate of course, been rejected by the Supreme Court. Myers v. Bethlehem building Corp., 303 U.S. 41, 50-52; Boire v. Greyhound Corp., 376 473, 477-478.[8/]

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n Republic Pictures Corp. v. Kappler, 151 F. 2d 543 (C.A. 8), cited y appellees (Br., p. 21), the court held that an Iowa statute im- osing a six-month limitations period for the bringing of actions rising under federal law, while allowing a longer period for "similar ctions arising or based upon other than federal laws" (151 F. 2d at 47), resulted in a denial of equal protection to those asserting ederal claims. The court was quite specific, however, in holding id. at 547) that only "litigants similarly situated may appeal to he courts for relief under like conditions and without discrimina- ion" (emphasis added).

lso incorrect is the contention (Br., pp. 9-10) that appellees were ntitled to assume that requesting the Board to apply for enforcement f the subpena would have been useless. Cf. Meekins, Inc. v. Boire, 20 F. 2d 445, 449-450 (C.A. 5).

The assertion (Br., p. 26) that Section 11(2) was not intended ongress to provide the exclusive remedy for enforcement of subpenas lso erroneous. N.L.R.B. v. British Auto Parts, Inc., 266 F. Supp. (C.D. Calif.), which appellees cite (Br., p. 26), is inapplicable. hat case, the court held that the Board could obtain an order directing mployer to produce a list of the names and addresses of his employees use in a representation proceeding under Section 9 of the Act) by rt to either the procedures of Section 11(2) or a mandatory injunction r 28 U.S.C. 1337. However, the opinion makes clear that the injunction ot to be considered an alternate method of enforcing a subpena. On contrary, the court held that even if the subpena be held unenforce- on the ground that the list is not "evidence" under Section 11(1) he Act, an injunction could issue to enforce the Board election rule iring the list.[9/] Here, appellees do not assert that they are re- ing the enforcement of a Board rule; they simply seek enforcement subpena. If, as we have shown, the exclusive provisions of Section) preclude their action, it is clear that the District Court had no r to enforce the subpena under 28 U.S.C. 1337. (See cases cited in ain brief, p. 15.)

IV. THE GENERAL COUNSEL IS AN INDISPENSABLE PARTY

Contrary to appellees' assertion (Br., p. 32), the Supreme 's decision in Williams v. Fanning, 332 U.S. 490, supports the con- ion that, in any event, the General Counsel was an indispensable to this action. In that case, the Postmaster General ordered a postmaster to return to the senders any mail directed to plaintiffs

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The rule was first set forth in Excelsior Underwear, Inc., 156 NLRB 1236.

to refuse payment of any money order drawn to their order. The ntiffs brought suit to enjoin the postmaster from carrying out the r. The Supreme Court, reversing the court of appeals, ruled that r action could not be dismissed for failing to join the Postmaster ral. In reaching this conclusion, it recognized the principle that superior officer is an indispensable party if the decree granting relief sought will require him to take action, either by exercising ctly a power lodged in him or by having a subordinate exercise it him" (332 U.S. at 493). The Court found, however, that the relief nt by the plaintiffs would expend itself on the subordinate official, postmaster, and would "not require the Postmaster General to do a e thing" because "no concurrence on his part /was/ necessary to make l" the actions required by the postmaster, i.e., the payment of the orders and the release of plaintiff's mail, which were plainly n his normal authority. The situation here is quite different. Board's Rules and Regulations specifically provide that Board em- es shall not testify or produce documents from the Board's files ut "written consent" from the Board or the General Counsel. Thus, elief sought will require the General Counsel to take affirmative n. If the subpena is enforced, he would be obligated to issue a en authorization for the release of documents from his files and ppearance of one of his employees. Such action, of course, would wise be completely outside Wilmot's authority as a Board employee. his reason, the District Court proceedings should have been dismis- or failure to join the General Counsel as an indispensable party.

V. THE SUBPENA WAS UNENFORCEABLE IN ANY EVENT

As shown in the Intervenor's brief (p. 16-19(, the subpena was nforceable in any event because (1) as appellees admit (Br., p. 3), egional Director refused to approve the settlement agreement they and it is accordingly ineffective and irrelevant to the proceedings; ppellees already have in their possession an original copy of the ment; and (3) a subpena duces tecum cannot be used to compel a wit- to compile a list of telephone calls, or any other materials, not istence at the time the subpena is served.

CONCLUSION

Since, under any of the above theories, the District Court enforcing the subpena was erroneous and must be vacated, any civil mpt proceedings arising out of disobedience of the order must also cated, even if it should be found that the District Court did have diction over the action. (See cases cited on p. 10 of our main .)

For the foregoing reasons, as well as those stated in our ng brief, a decree should issue reversing the judgments below, ing the orders of the District Court, and remanding the case with uctions to dismiss the petition.

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